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In the Supreme Court of the United States

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In its brief in opposition, the government does not dispute that, by virtue of the Seventh Circuit's decisions in *Gatimi* v. *Holder*, 578 F.3d 611 (2009), and *Ramos* v. *Holder*, 589 F.3d 426 (2009), there is a circuit conflict concerning the validity of the BIA's social-visibility and particularity requirements. The government also does not dispute the broader proposition that lower courts have long struggled with the definition of "particular social group" for purposes of eligibility for asylum under the INA. See, *e.g.*, *Fatin* v. *INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (Alito, J.). Finally, the government does not dispute that the question of whether a group must be "socially visible" and "particularized" in order to qualify as a "particular social group" is one of exceptional impor-

tance to the administration of the immigration system. Instead, the government offers a series of arguments as to why that question does not warrant review in this factual context or in this case. Those arguments are individually and collectively insubstantial. The Court should grant review to resolve the clear circuit conflict concerning the interpretation of a central provision of the immigration laws.

A. The Decision Below Deepens A Circuit Conflict Concerning The Definition Of "Particular Social Group"

1. The government essentially concedes that there is a circuit conflict concerning the validity of the BIA's social-visibility and particularity requirements. See Br. in Opp. 8, 11. As explained in the petition, the Seventh Circuit's decisions in *Gatimi* and *Ramos* do not merely "criticize[]" those requirements, see *id.* at 11; they reject them outright, see Pet. 10-12.[1] By contrast, leaving the government's numerative quibbles aside, see Br. in Opp. 11 & n.10, it is clear that the majority of circuits to have addressed the issue have upheld the social-visibility and particularity requirements. See Pet. 12-13.

With regard to *Gatimi* and *Ramos*, the government contends (Br. in Opp. 12-14) that those decisions are incorrect because they rest on an erroneous understanding of the BIA's social-visibility requirement: *viz.*, that the BIA requires a showing that the common characteristic

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[1] The government contends (Br. in Opp. 11-12) that the discussion of the social-visibility requirement in *Ramos* was dictum because the Seventh Circuit recognized that the BIA had not relied on it in the decision under review. The Seventh Circuit, however, had already rejected the social-visibility requirement in *Gatimi*, see 578 F.3d at 614-616, and it proceeded to reject the particularity requirement in *Ramos*, see 589 F.3d at 430-431.

be one that is visible to members of society, rather than one that is shared by a group perceived by society to exist. As a preliminary matter, the government's contention is ironic in the extreme, because it specifically advanced the allegedly erroneous understanding of the social-visibility requirement before the Seventh Circuit. See, *e.g.*, *Ramos*, 589 F.3d at 430; *Gatimi*, 578 F.3d at 616. And the BIA has articulated that same understanding in its decisions. See, *e.g.*, *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A.), review denied *sub nom. Castillo-Arias* v. *U.S. Attorney General*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007).[2] Not surprisingly, therefore, circuits that have *upheld* the social-visibility requirement have understood it in exactly the same fashion. See, *e.g.*, *Ramos-Lopez* v. *Holder*, 563 F.3d 855, 862 (9th Cir. 2009); *Scatambuli* v. *Holder*, 558 F.3d 53, 59 (1st Cir. 2009). The bottom line is that there is a clear circuit conflict concerning whether an alien must satisfy the social-visibility requirement (and the accompanying particularity requirement) to establish the existence of a "particular social group."

Indeed, the conflict among the circuits has only deepened since the filing of the petition for certiorari. Although the Sixth Circuit had seemingly endorsed the BIA's social-visibility and particularity requirements in an earlier opinion, see *Al-Ghorbani* v. *Holder*, 585 F.3d 980, 994 (2009), it has since held that former gang members would constitute a "particular social group." See

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[2] Although the government criticizes the Seventh Circuit (Br. in Opp. 12) for not discussing *C-A-* in *Gatimi*, the Seventh Circuit did so in *Ramos*—and concluded that *C-A-* "especially" supported the understanding of the social-visibility requirement that the government was advancing. See 589 F.3d at 430.

Urbina-Mejia v. *Holder*, 597 F.3d 360, 365-367 (2010). Given the Sixth Circuit's express reliance on *Gatimi* and *Ramos*, it now appears that the Sixth Circuit has also rejected the BIA's social-visibility and particularity requirements—further confirming the need for this Court's intervention.

2. In opposing certiorari, the government primarily contends that the Court's review is not warranted because there is no circuit conflict concerning whether "people who refuse to join a gang because they object to the gang's violent activities constitute a 'particular social group' under the INA." Br. in Opp. 8. As the Solicitor General is well aware, however, this Court grants review to resolve conflicts on questions of federal law—not on the application of federal law to particular facts. See S. Ct. R. 10. Although the government contends that "whether a proposed group qualifies as a 'particular social group' must be determined on a case-by-case basis," Br. in Opp. 8 (internal quotation marks and citation omitted), that is always true when a given legal standard is applied in different factual contexts.

It would be passing strange for the Court to refrain from granting review until there is a circuit conflict on the particular question whether Salvadoran youths who refuse to join gangs because of their opposition to the gangs' violent activities qualify as a "particular social group"—just as the Court did not wait for a conflict on the particular question whether the First Amendment protects a student's right to hold up a banner reading "BONG HiTS 4 JESUS" during an Olympic torch relay. See *Morse* v. *Frederick*, 551 U.S. 393, 397-400 (2007). Because the BIA has indisputably adopted the social-visibility and particularity requirements as part of the legal standard for determining "membership in a particular social group," the government does not have the

prerogative to rewrite the question presented in a way that limits it to the facts.

3. Instead, the key question for purposes of certiorari is whether resolution of the circuit conflict on the legal standard would be outcome-dispositive here. It plainly would be, notwithstanding the government's efforts to suggest otherwise. As a result of its rejection of the social-visibility and particularity requirements, the Seventh Circuit applies the BIA's preexisting standard, which focuses on whether the members of the proposed group share an immutable characteristic. See, *e.g.*, *Ramos*, 589 F.3d at 428 (citing, *inter alia*, *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)). Notably, the BIA has already indicated that the very group at issue here would satisfy the immutability requirement. See *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).[3]

The government's contrary argument (Br. in Opp. 9, 11, 14-15) rests on a passing citation in *Gatimi* of a Ninth Circuit decision rejecting a similar proposed group. See *Gatimi*, 578 F.3d at 616 (citing *Ramos-Lopez*, *supra*). In that decision, however, the Ninth Circuit expressly noted that, in *S-E-G-*, the BIA recognized that such a group *would* satisfy the immutability requirement (before proceeding to conclude that it would fail the social-visibility and particularity requirements). *Ramos-Lopez*, 563 F.3d at 860. And in its subsequent decision in *Ramos*, the Se-

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[3] Since the filing of the petition for certiorari, the United Nations High Commissioner for Refugees (UNHCR) has similarly noted that opposition to a gang's violent activities "may be considered irreversible and thus immutable." UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 13 (Mar. 2010).

venth Circuit held that former gang members would constitute a "particular social group," see 589 F.3d at 429-431—a proposed group that cannot be distinguished from the group at issue here (at least without devising still more novel requirements for group status, see Br. in Opp. 10 n.9). Because the choice of the appropriate legal standard would be outcome-dispositive in this case, it is an optimal vehicle for resolution of the circuit conflict.

4. The government identifies two other potential vehicle problems with this case. Both are invalid.

a. The government contends that the Court should deny review because the Fourth Circuit's decision in this case was "brief and unpublished." Br. in Opp. 10. The government does not dispute, however, that the Fourth Circuit unambiguously held that the BIA's adoption of the social-visibility and particularity requirements was entitled to deference—and that the proposed group failed both requirements. See Pet. App. 4a-5a. It would be one thing if petitioner were contending that the Fourth Circuit was the only circuit to have upheld the social-visibility and particularity requirements. But it is quite another where, as here, there is a preexisting circuit conflict with published decisions on both sides. The Court routinely grants certiorari to review unpublished decisions in these circumstances. See, *e.g.*, *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181 (2010); *Boyle* v. *United States*, 129 S. Ct. 2237 (2009); *Flores-Figueroa* v. *United States*, 129 S. Ct. 1886 (2009); *Crawford* v. *Metropolitan Gov't of Nashville & Davidson County*, 129 S. Ct. 846 (2009).

b. The government also contends that the Court should deny review because "petitioner is no longer a member of the social group that he proposed," on the ground that he is now 24 years old and thus no longer an adolescent. Br. in Opp. 15. But the government does not appear to have raised that argument before the immi-

gration judge (when, as of the date of decision, petitioner was 20), the BIA (when he was 23), or the court of appeals (when he was a day short of 24), and none of those adjudicators addressed such an argument in their decisions. Just as it is improper for a court of appeals to consider a justification for denial on which the BIA did not rely, see, *e.g.*, *Gonzales* v. *Thomas*, 547 U.S. 183, 185-187 (2006) (per curiam), it would be improper for this Court to deny review here based on a justification on which *neither* the BIA *nor* the court of appeals relied. In any event, such an argument would lack merit, because the BIA has taken the position that "the mutability of age is not within one's control"—and, as a result, "a claim for asylum may still be cognizable" as long as "an individual has been persecuted in the past on account of an age-described particular social group." *S-E-G-*, 24 I. & N. Dec. 583-584.

B. The Court Of Appeals' Decision Is Erroneous

1. Leaving aside the almost laughable suggestion that the BIA's social-visibility and particularity requirements constitute nothing more than a "restate[ment]" of the preexisting immutability requirement, see Br. in Opp. 3, the government offers no defense of the social-visibility and particularity requirements on the merits. That is for good reason, because there is no basis in the text of Section 1101(a)(42)(A) for either requirement. As explained in the petition, those requirements cannot be justified by resort to the interpretive canon of *ejusdem generis*, because neither social visibility nor particularity is a shared feature of the other bases for persecution identified in Section 1101(a)(42)(A). See Pet. 15-16. Nor is there a reasoned explanation for those requirements. See Pet. 16-17. And although the government implies that the social-visibility and particularity requirements

are derived from guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), see Br. in Opp. 4,[4] those guidelines—which interpret the international agreements on which Section 1101(a)(42)(A) was based—make clear that an applicant for asylum need only satisfy the immutability requirement in order to establish the existence of a "particular social group." See Pet. 19-20; UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 12 (Mar. 2010) (*Guidance Note*).

Perhaps most importantly, the government fails to reconcile the BIA's more recent decisions adopting the social-visibility and particularity requirements with its earlier decisions recognizing "particular social groups" without reference to those requirements. Although the government suggests that some of the groups at issue in the earlier decisions would have satisfied those requirements, see Br. in Opp. 2-3, it makes no such effort with regard to other groups, such as women opposed to genital mutilation. See *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996). Nor is it readily possible to see how a group such as women opposed to genital mutilation could satisfy the social-visibility requirement—at least as it has been articulated in *C-A-* and other more recent BIA decisions—because, as the government seemingly concedes (Br. in Opp. 14), the shared characteristic of that group is not necessarily "highly visible and recognizable by others." *C-A-*, 23 I. & N. Dec. at 960; see

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[4] But see Gov't Supp. Letter Br. at 10, *Orellana-Monson* v. *Holder*, No. 08-60394 (5th Cir. Nov. 18, 2009) (conceding that "[t]he [BIA] was not purporting to adopt the [UNHCR's] specific social group formulation" and asserting that the BIA was not "required to adopt the UNHCR's approach").

Zsaleh E. Harivandi, Note, *Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum*, 95 Corn. L. Rev. 599, 612 (2010) (explaining that, "[i]n the cases of both women who have already undergone [genital mutilation] and those who have not, the visibility requirement of the social-group category presents a problem"). As a result, the BIA's adoption of the social-visibility and particularity requirements is not entitled to deference, either because the BIA has taken inconsistent positions or because it has changed position without explanation. See Pet. 18.

Perhaps recognizing that problem, the government now takes the position that the social-visibility requirement requires a showing not that the common characteristic be one that is visible to members of society, but rather only one that is shared by a group perceived by society to exist. See Br. in Opp. 12-14; pp. 2-3, *supra*. As a preliminary matter, the court of appeals appears to have applied the former, more stringent definition of social visibility in rejecting petitioner's claim, see Pet. App. 4a (quoting *Scatambuli*, 558 F.3d at 59), and the BIA has done so with regard to both the proposed group at issue here and other proposed groups, see *In re E-A-G-*, 24 I. & N. Dec. 591, 594-595 (B.I.A. 2008); see *In re A-T-*, 24 I. & N. Dec. 296, 303 (B.I.A. 2007), vacated on other grounds, 24 I. & N. Dec. 617 (2008); *C-A-*, 23 I. & N. Dec. at 960. And it seems likely that petitioner's proposed group would actually satisfy the latter definition, because members of Salvadoran society would perceive those who refuse to join a gang because of opposition to the gang's violent activities as a group. See UNHCR, *Guidance Note* 14-15. Insofar as the government effectively concedes that the court of appeals applied an incorrect version of the social-visibility requirement in this case, the decision below should be reversed outright on

that basis alone. But more broadly, the evident uncertainty concerning the meaning of the social-visibility requirement merely underscores the bankruptcy of the BIA's approach (and the inappropriateness of *any* social-visibility requirement). At a minimum, therefore, this Court should grant plenary review and reverse the Fourth Circuit's erroneous decision upholding the social-visibility and particularity requirements.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review

1. The government does not dispute that the question presented in this case is one of obvious importance to the administration of the immigration system. Nor could it, given its previous recognition that courts are confronted with thousands of petitions for review in asylum cases annually and that questions concerning the standards of eligibility for asylum therefore recur with considerable frequency. See Pet. at 21, 23, *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (No. 05-552).

2. Notwithstanding the resulting circuit conflict, the government did not seek certiorari in *Gatimi* or *Ramos*. To the contrary, since those decisions, the government appears to be engaging in a deliberate effort to avoid further decisions in the courts of appeals addressing the validity of the social-visibility and particularity requirements—whether out of concern that circuits that had previously upheld those requirements will reverse course and follow the Seventh Circuit, or out of concern that further decisions on the issue could trigger this Court's review. One example is particularly instructive.

As noted in the petition (at 13), the Fifth Circuit recently issued an opinion that signaled its approval of the social-visibility and particularity requirements. See *Orellana-Monson* v. *Holder*, 332 Fed. Appx. 202, 203

(2009) (No. 08-60394). After the applicants for asylum sought rehearing en banc based on *Gatimi*, the Fifth Circuit withdrew the opinion and granted panel rehearing. See Order on Pet. for Reh'g En Banc at 1, *Orellana-Monson*, *supra* (Dec. 17, 2009). A week before oral argument, the government, having previously defended the social-visibility requirement in numerous briefs in the case, abruptly reversed course and declared it would no longer do so because it had come to the realization that the BIA had not in fact relied on that requirement in the decision under review. See Gov't Letter at 1, *Orellana-Monson*, *supra* (Feb. 22, 2010). In light of the government's last-minute change in position, the Fifth Circuit remanded to the BIA for clarification. See *Orellana-Monson*, *supra* (Mar. 15, 2010), slip op. 3.

We respectfully submit that, as long as the BIA continues to apply the social-visibility and particularity requirements, the government should be willing to face the music and defend those requirements in the courts—including this Court. There is a clear circuit conflict on the validity of those requirements, and this case is in all respects an optimal vehicle in which to consider the issue. The Court should grant review here in order to resolve the circuit conflict and restore the correct interpretation of a vitally important provision of the immigration laws.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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